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No. 20

In the Supreme Court of the United States

OCTOBER TERM, 1957

SCHAFFER TRANSPORTATION COMPANY AND AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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September 1957.

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OPINIONS BELOW

The opinion of the District Court (R. 359–369) is reported in 139 F. Supp. 444. The report of the Commission on reconsideration (R. 24–38) dated February 7, 1955, is reported at 63 M. C. C. 247.

JURISDICTION

The final judgment of the three-judge district court was entered on May 25, 1956 (R. 369). Notice of appeal was filed on July 19, 1956 (R. 370). The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b).

QUESTIONS PRESENTED

1. Whether the Commission's finding that the public convenience and necessity does not require the proposed motor carrier service is supported by substantial evidence.

2. Whether the Commission's denial of an application for a motor carrier certificate of public convenience and necessity violates the National Transportation Policy because the Commission took into account, among other factors, the adequacy of the existing railroad service.

STATUTE INVOLVED

The relevant provisions of the Interstate Commerce Act are set forth in the Appendix, infra, pp. 42–43.

STATEMENT

Proceedings before the Commission

This is a direct appeal from a final judgment entered May 25, 1956, by a three-judge district court dismissing a suit seeking to set aside an order of the Interstate Commerce Commission. The Commission's order denied the application of A. W. Schaffer, d. b. a. Schaffer Transp. Co., hereinafter called Schaffer, for a certificate of public convenience and necessity pursuant to the provisions of section 207 (a) of the Act, see Appendix A, pp. 42–43.

On May 28, 1951, Schaffer filed an application for a certificate of public convenience and necessity authorizing operation in interstate commerce as a com-

mon carrier by motor vehicle of granite, manufactured and rough, (1) from points in Grant County, S. Dak., to points in West Virginia, Maryland, Connecticut, Massachusetts, Vermont; Texas, Arkansas, Louisiana, Wyoming, North Dakota, and the District of Columbia, and (2) from points in Vermont to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas, and Louisiana, over irregular routes (R. 7, 25).

Protests against the application were filed by rail carriers and thereafter the matter was assigned for hearing before an examiner. Two hearings were held, the first at St. Paul, Minn., on June 13, 1952, and the second on December 2, 1952, at Washington, D. C. (R. 344, 345). At the first hearing, William Dingmann d/b/a Granite City Transfer of St. Cloud, Minn., hereinafter called Dingmann, appeared in opposition to the application in addition to the protesting rail carriers R. 179–199).

On February 10, 1952, the examiner issued his report and recommended order granting the application in part (R. 357–358). After exceptions and reply to the examiner's report were filed, the Commission, Division 5, with one member dissenting, issued its report and order decided May 24, 1954 (R. 6–24). The order of the Commission, Division 5, granted the application for service from (1) points in Grant County, South Dakota, to points in Wyoming, North Dakota, Texas, Arkansas,

Louisiana and West Virginia, and (2) from points in Washington and Orange Counties, Vermont, to points in South Dakota, Minnesota, North Dakota, Montana, Wyoming, Colorado, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Oklahoma, Arkansas, Texas and Louisiana. It denied authority to Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia (R. 22–23). Petitions for reconsideration were filed, and by order of the Commission, Division 5, entered November 12, 1954, granting the petitions for reconsideration, and it reopened the proceeding for reconsideration on the present record.

Upon the granting of petitions for reconsideration, the full Commission assumed jurisdiction of the proceeding (R. 25), and on February 7, 1954, it entered its order with accompanying report denying the application, four Commissioners dissenting (R. 24–38). On May 16, 1955, the Commission issued an order permitting the intervention of certain parties and denying the petitions for further reconsideration and oral argument (R. 39–40).

The report and order of the Commission entered February 7, 1954, denying the application, were challenged by the appellants in the district court, which in an opinion dated March 13, 1956, unanimously upheld the action of the Commission (R. 359–369).[1]

[1] In the district court the United States joined the Commission in defense of its orders.

SUMMARY OF ARGUMENT

The Interstate Commerce Act, Part II, authorizes the Commission in its discretion to grant certificates of public convenience and necessity to common carriers by motor vehicles. Section 207 (a) authorizes the Commission to grant certificates of public convenience and necessity to qualified applicants desiring to perform transportation in interstate commerce provided that the Commission finds, among other things, that the proposed service is required by the present or future public convenience and necessity. Otherwise the application shall be denied.

The Commission in the instant proceeding found that public convenience and necessity did not require the proposed operation and accordingly denied the application. The Commission exercises broad and exclusive administrative discretion in determining public convenience and necessity. *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35, 42. It is the Commission's duty "* * * not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment to determine from its analysis of the total situation on which side of the controversy the public interest lies." *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241.

The Commission in denying the application for a certificate of public convenience and necessity did so on the ground that the applicant failed to sustain the

burden of proof that a public need existed for the the proposed service.

Underlying the ultimate conclusions was the fact that the evidence of record showed that the shippers supporting the application were motivated by a desire for lower rates rather than a need for additional or better service which could not be provided by existing transportation facilities. The desire to obtain lower rates cannot be considered as controlling in an inquiry to determine public convenience and necessity under section 207 (a) of the Act, 49 U. S. C. 307 (a). *American Trucking Assn's.* v. *United States,* 326 U. S. 77; *Youngblood Extension of Operations—Canton, N. C.,* 8 M. C. C. 193.

II

Whether the Commission can consider the adequacy of existing rail service to handle the transportation requirements of shippers, where the basic element of a need for the proposed motor carrier service has been established is not properly before the Court on appeal. However the National Transportation Policy, on its face, requires the Commission to consider the effect of its determinations in proceedings involving certificates of public convenience upon competing forms of service for the purpose of fostering "* * * sound economic conditions in transportation and among the several carriers * * * all to the end of developing, coordinating, and preserving a national transportation system. * * *" The failure

of the Commission to consider its actions in the light of all of the terms of the National Transportation Policy would be contrary to the mandate of Congress. The direction to the Commission that it must administer the Act to preserve the inherent advantages of each mode of transportation is not designed to favor one mode over another, but to preserve the inherent advantages of all. The Commission must consider the adequacy of existing rail carrier service where the rail carriers are parties in interest and have standing to sue. *Alton Railroad Co.* v. *United States,* 315 U. S. 15. The Commission's action in the premises is in accord with the provisions of the National Transportation Policy.

ARGUMENT

I

The order of the Commission denying the application for a certificate of public convenience and necessity is predicated upon substantial evidence of record and complies with the applicable provisions of the Interstate Commerce Act

(a) The Commission exercises broad and exclusive administrative discretion in determining public convenience and necessity

The nature and extent of the power vested by Congress in the Commission in matters arising under section 207 (a) of the Act, such as the instant appeal, has been the subject of considerable litigation, extensive judicial analysis and is well settled. Antecedent to the enactment of part II of the Interstate Commerce Act, judicial determination of the Commission's power under section 1 (18) of the Act (49 U. S. C.

sec. 1 (18)), involving applications for certificates of public convenience and necessity, and abandonment of rail lines by rail carriers constituted the precedents for later judicial interpretations of the Commission's power under section 207 (a) of the Act. In *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42, the court held:

> There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question.

See also *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 273; *Colorado* v. *United States*, 271 U. S. 153, 168; *Powell* v. *United States*, 300 U. S. 276, 287.

In *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65, the Court had under consideration an order of the Commission granting a certificate to a wholly owned motor carrier subsidiary of a rail carrier. Basing his opinion upon the court's prior experience reviewing the Commission's discretionary power under section 1 (18) and (20) of the Act, 49 U. S. C. sec. 1 (18), (20), Justice Reed said, at p. 65:

> Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from a half-century experience of the government in the regulation of transportation. When Con-

gress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which had been employed for similar purposes for railroads in the same Act since the Transportation Act of 1920, section 402 (18) and (20), 41 Stat. 477. Such use indicated a continuation of the administrative and judicial interpretation of the language. Cf. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115. The Commission had assumed, as its duty under these earlier subsections, the finding of facts and the exercise of its judgment to determine public convenience and necessity. This Court approved this construction. *Chesapeake & Ohio R. Co.* v. *United States*, 283 U. S. 35, 42. Cf. *Gray* v. *Powell*, 314 U. S. 402, 411–12. The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor carrier service would serve public convenience and necessity. Cf. *Powell* v. *United States*, 300 U. S. 276, 287. This, of course, gives administrative discretion to the Commission. Cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87–88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. * * *.

The Court, during the same term, considered a similar question concerning the Commission's scope of authority in granting or denying certificates of public convenience and necessity under the water carrier provisions of the Act, 49 U. S. C. sec. 909 (c). In *United*

States v. *Detroit Navigation Co.*, 326 U. S. 236, Justice Douglas stated at p. 241:

> * * * The Commission is the guardian of the public interest in determining whether certificates of public convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See *Chesapeake & Ohio R. Co.* v. *United States*, 283 U. S. 35, 42; *Alton R. Co.* v. *United States*, 315 U. S. 15, 23. Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide. It went no further here.

The holding of the Court in the *Detroit Navigation Co.* case, *supra*, further emphasizes the broad administrative discretion vested in the Commission in

matters involving the public convenience and necessity with respect to additional transportation. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, 158; *Capital Transit Co.* v. *United States*, 97 F. Supp. 614; *St. Johnsbury Trucking Co.* v. *United States*, 99 F. Supp. 977, 981; *A. B. & C. Motor Transp. Co.* v. *United States*, 69 F. Supp. 166, 167. In *Wales* v. *United States*, 108 F. Supp. 928, 932, affirmed per curiam 345 U. S. 954, the court said:

> We do not understand that the words, "convenience", and "necessity," are to be bounded and limited by any authority, save and except the Interstate Commerce Commission. * * *.

We submit that the Commission's order was made in conformity with the criteria sanctioned by the decisions of the courts noted above. The Commission, after extensive hearings and consideration of the matter over a period of approximately four years, after analysis of the large record and the many exhibits, properly exercised its administrative discretion when it found that public convenience and necessity did not require the proposed operation. This determination, supported by substantial evidence of record, was sustained by the district court (R. 362, 367), *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547–548; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146, and for the same reason the judgment of that court should be affirmed.

(b) The evidence adequately supports the findings of fact and the conclusions arrived at by the Commission

The Commission stated its conclusions (R. 37) as follows:

> On the foregoing facts, we are unable to conclude that the public convenience and necessity require the proposed operation. It is seen that for one reason or another the supporting witnesses find fault with the presently utilized rail service. Actually, however, the evidence warrants the conclusion that the witnesses are reasonably satisfied with rail service except for the one complaint that all share, namely, that rail service is too slow. Nevertheless, it is the practice for the Vermont shippers to hold finished granite until they can accumulate a pool-car load in order that the shipments may move at the lower pool-car rate. This practice is followed with the knowledge and consent of the consignees, and the sole purpose therein is to take advantage of the lower rail rate. Less-than-carload rail service, while not as expeditious as the proposed service, is fairly good, but because of the higher rate involved this service is seldom used by the supporting witnesses. The testimony of the South Dakota shipper also indicates that its support of the application is largely motivated by anticipated cheaper transportation.
>
> We have carefully considered applicant's arguments to the contrary, but are forced to conclude that the service presently available is reasonably adequate. The evidence indicates that the witnesses' main purpose in supporting the application is to obtain lower rates rather

than improved service. It is well established that this is not a proper basis for a grant of authority, and the application, therefore, must be denied.

All of the contentions of the parties have been considered even though not specifically discussed. In view of our conclusions herein it is unnecessary to consider the question of applicant's fitness to conduct the proposed service.

The evidence adduced before the Commission adequately supports the conclusions set forth above. There are two operations involved in Schaffer's application: (1) the eastbound and southern movement, and (2) the westbound movement from points in Vermont to points in 16 states (R. 24–25). We shall consider initially the evidence offered in support of the eastbound and southern movement.

1. The eastbound and southern movement

The report of the Commission sets forth the findings of fact (R. 28–29) regarding the *single* shipper witness desiring motor carrier service from Grant County, S. Dak., to points in the New England States, Texas, Arkansas, North Dakota and West Virginia.

The appellants concede that insofar as the order of Division 5 of the Commission denies (R. 22–23) the application with respect to service to Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia, the existing motor carrier service is adequate (Appellants' br. p. 3; br. of United States p. 6). However, the Commission upon reconsideration went into every aspect of the record before rendering its final decision. The mere fact that the Commission

changed its mind upon reconsideration does not constitute reversable error. *Beard-Laney* v. *United States*, 83 F. Supp. 27, 33, aff'd per curiam 338 U. S. 803.

The paucity of evidence indicating a need for the proposed service on the eastbound and southern movement is exemplified by the testimony of the shipper from Milbank, S. Dak. (R. 85). He pointed out that very little granite is shipped into Vermont (R. 87); that he would use the service into Connecticut about seven times a year; and that with respect to Texas "* * * for the next year we wouldn't use it very often * * *" (R. 92).

Although he mentioned that he had salesmen in Arkansas, North Dakota and West Virginia, and that he had some orders on file from these states (R. 91) his testimony is devoid of any evidence of the amount of traffic and the transportation requirements into these states. In addition, no evidence at all was adduced with respect to Maryland, Louisiana, Wyoming and the District of Columbia, the other points desired to be served by Schaffer. The Commission in its report found with respect to the use made of presently available motor carriers that "It has not used the service of Dingmann [motor carrier opposing application] in the past two years primarily because of rate considerations * * *" (R. 29). Rather than take advantage of the existing motor carrier service, this shipper relied upon carload rail transportation (R. 95). The inference that the question of rates, rather than need, determines the mode of transportation to

be used is solidified by the following colloquy (R. 98–99), regarding truckload or split delivery service to points in the eastern states:

> A. I would have to qualify that statement. I would have to be able to consider the *rates* on that split shipment, because the majority or practically all of our shipments into that area, since it is so close to Berry [Barre], are small shipments, split shipments, and although the stops might only be ten miles apart, those *rates* will have to be fairly competitive, because they will be competing with granite from the Berry [Barre] area.
>
> Q. In other words, as I construe your answer, such a service would meet your requirements with the qualification that the *rates* might seem too high in split deliveries, is that your answer?
>
> A. I would have to qualify that, too. If we could expect service when we called for a truck and if the *rates* were competitive with rail *rates* and other types of carrier rates or carload, pool carload to Chicago rates, I would say it may meet our needs. [Emphasis supplied.]

This is further emphasized by the shipper testimony (R. 105) that he would not use Dingmann's service under the present tariff despite the similarity of services and facilities with that of Schaffer. Plainly this shipper who acknowledges no complaint regarding existing service (R. 97–98) desired Schaffer's service merely because of the opportunity to obtain a lower rate.

2. The westbound movement

The Commission (R. 29–35) states its findings of fact drawn from the evidence adduced by shipper witnesses interested in the westbound movement of the application. Their testimony shows a substantial accord with that of the witness representing the shipper supporting the eastbound movement in that their desire for the proposed service is motivated primarily by the hope of obtaining lower rates.

Several monument dealers located in the midwest appeared on behalf of the application for authority to transport rough and finished granite from Vermont. Osborne-Peterson, Inc., of St. Paul, Minn., fabricates and letters monuments and markers which it sells at retail (R. 74–75). It receives granite from Barre, Vt., primarily in rail carload shipments (R. 75). Although the shipper states that it desires expedited service (R. 80), apparently the present service is suitable since it does not take advantage of the faster less-than-carload movement. However, it would rather delay its shipments for the accummulation of sufficient freight to make up a pool car (R. 75). With respect to the use he would make of the proposed service, he stated that "* * * perhaps a half a dozen times a year" (R. 76, 83). He intended to use the service sometimes in complete truckload movements and sometimes for one unusual marker of "perhaps two or three monuments" (R. 83–85). The shipper does not propose to ship all of its granite by truck (R. 81), but intends to continue using rail carload service (R. 75). The witness also pointed out

that his business is seasonal and that from November to April business is quiet (R. 78).

McCarty Memorials of Hutchinson, Kans., engages in the sale of public and private memorials. It purchases mostly finished monuments and markers (R. 135–136). At the present time it utilizes rail service from Barre, Vt., to Kansas City, Kans., and motor carrier service from the latter city to its place of business (R. 136). The amount of granite it receives a year from Barre is only about six less-than-carload shipments, approximating about a carload a year (R. 137, 144). The less-than-carload shipments amount to a maximum of 3,000 pounds each (R. 137). In answer to a question as to whether he would have used motor carrier service if it had been available, he stated, "Not necessarily" (R. 137). Service by rail from Barre takes only 14 to 21 days (R. 139–140). He has never requested any motor carrier service from Barre nor has he made a survey as to those available (R. 144). McCarty is aware that Schaffer would have to solicit additional traffic for a truckload from other dealers in his area in order to serve him (R. 145–146). Despite the so-called need for the applicant's expedited service, McCarty would not carry a reduced inventory of Vermont granite (R. 149).

The testimony of Norris E. Walther, who is in the retail monument business at Fremont, Nebr., (R. 149–150) is similar to McCarty's except that he would have a smaller volume of traffic (R. 155). He explained that one of the major reasons for supporting

the applications was the possibility of a low rate (R. 151). At the present time, he has motor carrier service from Milbank, S. Dak., and from Cold Spring and St. Cloud, Minn. while this shipper has "wondered" about motor carrier service from Barre, he appears to have made no investigation of the availability of such transportation (R. 152, 156).

Paul Stevenson of Moberly, Mo., a retail monument dealer uses rail service almost exclusively from Barre (R. 158). He receives about two to three pool carload shipments a year and finds the service good (R. 159). He has experienced no delay in such service (R. 160). This shipper apparently finds no pressing need for the proposed service because he only "thought" that he needed the additional transportation (R. 159). Although he has received shipments by interline motor carrier service from the "Twin Cities" he complained of the high rate (R. 162).

Ed Hunstad of Aberdeen, S. Dak., engages in the retail monument business (R. 165). He has received rail shipments in less-than-carload lots in 17 days from Barre (R. 166). The shipper obtains about 25,000 to 30,000 pounds of granite a year from Barre (R. 167). In order to use applicant's service, he would have to allow his shipments to accumulate with that of other dealers located in his area in order to obtain split-delivery truckload service (R. 168). This method is similar to that followed by the rails in accumulating pool carloads in order to benefit from the lower rates. While this shipper expresses a need for fast service, at the present time, when requesting

transportation, he specifies, "the fastest and *cheapest* route" (R. 169). [Emphasis supplied.]

Richard C. Farrell of Loves Park, Ill., is the last shipper located in the vast territory plaintiff seeks to serve from Vermont. He is a retail dealer in monuments (R. 169). He purchases only about 20,000 to 25,000 pounds of granite a year from Barre, which is received in less-than-carload shipments (R. 170). In ordering granite from Barre he specifies the "speediest" delivery (R. 173). However, he does not intend to transfer all of his shipments from rail to motor carrier transportation since in some cases speed is not essential (R. 177).

Two shippers of Barre, Vt., engaged in the quarrying of granite and in the manufacture of markers and monuments appeared on behalf of the proposed service. Jones Brothers Company and Rock of Ages Corporation at the present time utilize rail service primarily for their transportation needs (R. 224, 249). While the witnesses for the shippers testified that there was a pressing need for Schaffer's motor carrier service, it is apparent that they do not utilize the expedited less-than-carload rail service which is available daily (R. 260) because of the single motivating factor, higher *rates*.

Witness Heber England, representing Jones Brothers Company, made the following illuminating remarks concerning Exhibit No. 23 (R. 330–332), listing the transit time of pool-car shipments (R. 240):

> Q. Will you turn to Exhibit No. 23, Mr. England?
>
> A. Yes.

Q. On that first shipment which was furnished on March 22, 1951, and was not shipped until May 14, 1951, that could have gone out on the 22nd of March, could it not, via rail less than carload?

A. Yes.

Q. The reason it was held was to take advantage of the pool car rate?

A. Yes.

Q. And the same applies to every other shipment?

A. I believe so.

Q. So that where the two factors have to be weighed, transit time and the rate, isn't it true that the rate governs?

A. No, not necessarily. I think a dealer, if he possibly can, will instruct us to hold the shipment until it can get into a pool car because of the *rate*.

Q. Yes, sir. That is customary, is it not?

A. Yes. [Emphasis supplied.]

Nelson P. Wright, appearing for the Rock of Ages Corporation, testified similarly (R. 257). He stated:

Q. And you hold those shipments for pool car movement to get the advantage of the pool car *rate*?

A. Yes. [Emphasis supplied.]

and at (R. 260):

Q. If you hold shipments for pool car movement for a week to thirty days where you have the opportunity to ship daily via either the Central of Vermont Railroad or the Barre and Chelsea Railroad, is the decision to hold for the pool car movement brought about by the

cheaper pool car rate and the saving to the dealer?

A. In part, if you ship at less than carload you have to pay the higher rate and the pool car is more economical and of course a solid car is more economical. But you don't have enough weight going to the dealers in a specific area. They don't want—I should say they don't order this week and it is shipped a month later. They order this week and want it shipped next week. It may take you a while to get those orders accumulated to get enough weight for a pool car.

Q. Maybe I can shorten this up. If this applicant, Mr. Schaffer, should receive the authority that he seeks, Mr. Wright, from the Commission, and he publishes a tariff on a parity or higher than the present less than carload rail rate, you can't give him any business, can you?

A. Frankly, a dealer can control that. Our dealers seem to be mostly concerned with getting quicker delivery.

Q. If they order quicker delivery, do you hold shipments thirty days when you can ship every day in less than carload lots?

A. If you ship in less than carload delivery, it will cost a lot more than it will in pool car.

Assuming that these witnesses were concerned only with the need for expedited motor carrier service, their testimony, while interesting, can be accorded very little weight, because it is the consignees who pay the charges and control and specify the method of transportation and routing, rather than the manufacturers (R. 237, 259). The terms of shipment are

f. o. b. origin (R. 241, 259). Although the two Vermont witnesses complained of lack of motor carrier service, their testimony showed the use of such service to points in New England, New York, Pennsylvania, and New Jersey (R. 225, 251, 257). There was no attempt made to use motor carrier interline service from the above states to points in the states named in the application (R. 238, 258). It is rather surprising to note that of the 800 tons of shipments made by Jones Brothers Company to points in the states requested to be served by applicant, only 300 tons move in less-than-carload shipments which might be made available for motor carrier transportation. The 300 tons broken down for daily shipment would amount to about 1½ tons (R. 232). It is evident that such a small amount of tonnage daily would not warrant applicant's deadhead operation from points such as West Virginia. The examiner who heard the case asked whether or not the shipper would consolidate these shipments into weekly movements or was the shipper expecting daily outbound transporation. The witness, Mr. England, evaded direct answer to this question by merely stating, "From our point of view we would like to have them out each day; and the dealer would like them each day." (R. 232). Obviously, no motor carrier could stay in business very long on that type of operation. However, despite the claims and contentions made by the shippers from Vermont, there is no assurance that applicant would get any of the traffic from Barre unless he was able to provide an advantageous rate. At R. 261, the testimony of Mr. Wright on this point

adequately summarizes the position of the Vermont shippers:

> Q. [By Mr. Lane] If Mr. Schaffer published a tariff with the higher rate level than the existing less-than-carload rail rate, you couldn't give him your business, could you?
>
> A. I don't think so.[2]

There remains the last witness appearing in support of the proposed service. This witness purportedly represented members of the Barre Granite Association. The Commission, in its report, stated that the association "does not sell granite but limits its activities to the consolidation of shipments and the arranging of pool-car service out of Barre for its members" (R. 35). This statement reflects the testimony of the witness at R. 127. The evidence offered by Richard T. McBride can only be characterized as hearsay, requiring limited weight. The following colloquy is an example of the type of information this witness offered to prove a need for Schaffer's service (R. 275–276):

> Q. I want to make this as short as possible. I don't like to prolong this record. If I asked you specific questions about these 18 manufacturers who you purport to represent with regard to destination, tonnage to specific destinations, methods of transportation being used at the present time, the split between pool car, full carload, and less than carload, questions of that nature, would you be able to stand cross-

[2] Schaffer planned to increase his rates (R. 111–112); thus making the possibility of attracting this traffic even more remote.

examination and answer me in a responsive manner?

A. I think I would attempt to do the best of my knowledge.

Q. Where do Cook and Watkins ship in the 16 states involved in this application?

A. I don't have that specific information.

Q. If I asked you the same question about the other 17 manufacturers, would your answer be the same?

A. Yes, I would not have that specific information.

Obviously, without this information which is pertinent to a hearing involving the granting of a certificate of public convenience and necessity, the Commission could give little weight to the hearsay information offered by this witness.

The foregoing analysis of the evidence of record concerning the supporting shippers, in addition to the carefully delineated findings of the Commission, clearly supports its ultimate conclusions. Schaffer had requested to serve 11 states on the eastbound and southern movement. However, the only shipper witness supporting this phase of the application showed at the most a speculative need based upon rates for service to points in Connecticut already served by another motor carrier. There was no other evidence adduced to show a need for service to the other 9 states and it was conjectural with respect to Texas.

The Commission has consistently stated that existing motor carriers are entitled to transport all the traffic they can handle adequately, economically and efficiently without the competition of a new motor

carrier service. *Holland Transp. Co., Inc., Extension—Massachusetts,* 33 M. C. C. 558, 560; *Thompson Extension of Operations,* 34 M. C. C. 5, 13; *Deaton Truck Lines, Inc., Common Carrier Application,* 32 M. C. C. 89, 100; *Contract Carriers, Inc., Common Carrier Application,* 41 M. C. C. 165, 170; *Santa Fe Trail Transp. Co. Extension—Joplin,* 41 M. C. C. 713; *Rock Island Motor Transit Co. Extension—Eldon, Iowa,* 33 M. C. C. 349, 357; *Clark-Callahan, Inc., Common Carrier Application,* 41 M. C. C. 693, 706; *Maner Common Carrier Application,* 42 M. C. C. 778, 787.

The mere preference or desire by the shipper for applicant's motor service over that offered by existing carriers is insufficient in the absence of evidence showing that carriers now authorized cannot or will not render a reasonably adequate service. *M. & H. Transport Service Co. Extension—Willow Run,* 47 M. C. C. 409, 412.

On the westbound movement, Schaffer sought to serve points in 16 states. Out of this vast territory only 6 witnesses appeared from specific locations in 6 states to support the application. The evidence adduced by these witnesses, as noted above and in the Commission's report, may be fairly summarized in the statement that while they desire motor carrier service they have made no effort, or very little effort, to obtain such service and if such service were available the rates to be paid for the transportation would dictate whether or not motor carrier transportation would be used. This cannot be construed in any sense

as indicating a need for additional transportation. The Commission properly concluded (R. 37):

> We have carefully considered applicant's arguments to the contrary, but are forced to conclude that the service presently available is reasonably adequate. The evidence indicates that the witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service. It is well established that this is not a proper basis for a grant of authority, and the application, therefore, must be denied.

The desire to obtain a lower rate cannot be considered relevant in an inquiry to resolve public convenience and necessity under section 207 (a) of the Act, 49 U. S. C. 307 (a). *Wellspeak Common Carrier Application,* 1 M. C. C. 712; *Youngblood Extension of Operations—Canton, N. C.,* 8 M. C. C. 193; *Johnson Common Carrier Application,* 18 M. C. C. 194.

The Commission has consistently refused to consider the issue of rates as pertinent in proceedings for operating authority, since that is a matter for which other sections of the Act provide a remedy. *Omaha & C. B. Ry. & Bridge Co. Common Carrier Appln.,* 52 M. C. C. 207, 235; *Black Extension of Operations—Prefabricated Houses,* 48 M. C. C. 695, 709; *Pomprowitz Extension—Packing House Products,* 51 M. C. C. 343, 350.

In *Roadway Express, Inc., Extension—Jamestown, Pa.,* Docket No. MC–2202 (Sub–No. 91), decided February 26, 1953, 61 M. C. C. 807 (not printed in full), the Commission, on reconsideration, stated:

> * * * If shippers believe that the rates of existing carriers are unjust and unreasonable, they have adequate means of obtaining relief under other provisions of the Act. There is nothing to indicate the nature of the transportation service available to the shipper's competitors or the extent to which the competitors ship to points in the named States; therefore the shipper's contention that it needs the proposed service to meet competition is not shown to have merit. Applicant has failed to sustain its burden of proving that there is a public need for the proposed operation and the application must be denied."

Whether the shippers find fault with the level of motor or rail carrier rates is of no moment in a proceeding involving the request for a certificate of public convenience and necessity under section 207 (a) of the Act. The law is applicable equally.

The refusal of the Commission to grant a certificate to an applicant where the evidence indicates a dissatisfaction with existing rates rather than a need for transportation service as such falls within the express declaration of the Court in *American Trucking Ass'ns.* v. *United States,* 326 U. S. 77. In that case the Court, while holding that the Commission had improperly excluded evidence, sustained the holding of the Court below [56 F. Supp. 394, 400] that the allegedly discriminatory features of the applicant's rates were not properly in issue in a certificate proceeding, since "ample administrative remedy is afforded in the shape of an application to the Com-

mission". Justice Reed stated for the Court (326 U. S. 77, at 86–87):

> * * * It is objected that the railroad as a motor carrier has been permitted through other proceedings to file illegal tariffs, violative of § 217 of part II of the Interstate Commerce Act, and has been improperly exempted by the Commission from certain accounting requirements of § 220 of the same part to which the other motor carriers are subject. *These are obviously not grounds upon which appellants can base an argument against the grant of a certificate of convenience and necessity.* [Emphasis supplied.]

The converse is true where an application for a certificate finds its primary support in a mere desire for lower rates.

In *Atlanta-New Orleans Motor Freight Co., et al.* v. *United States, et al.*, U. S. D. C., N. D. Ga., Atlanta Div., 10 Federal Carrier Cases 2085, a three-judge statutory court, in upholding the Commission's determination to grant additional operating authority to a motor carrier, considered the charge made by plaintiffs that the Commission's decision was not based upon proper evidence of public convenience and necessity. The plaintiff's alleged that the record before the Commission showed that the supporting shippers were primarily concerned with obtaining lower rates. The court acknowledged that the record did contain some references to rates but at the same time stated that there was sufficient evidence of public convenience and necessity to sustain the Commission's final decision. The opinion of the court in the *At-*

lanta-New Orleans Motor Freight case, *supra,* is applicable to the proceeding before this Court because the Commission denied additional authority to Schaffer on the ground that the evidence of record indicated that the shippers were not concerned with the need for additional service, but were desirous of obtaining lower rates.

The court's statements in the *American Trucking Association* case, *supra,* and the opinion in the *Atlanta-New Orleans Motor Freight* case, *supra,* confirm and approve the Commission's long standing administrative construction of the act, under which it has consistently refused to consider the issue of rates as a factor pertinent in certificate proceedings.

Appellants contend that the Commission denied the application solely on the grounds that the existing railroad service was sufficient to meet the needs of the shippers and that there is no evidence to support the conclusion that the shippers were interested in lower rates rather than improved service. A similar charge was made by the plaintiff in *Ayer* v. *United States,* 139 F. Supp. 440. The *Ayer* case involved a review of the Commission's denial of an application by a motor carrier for a certificate of public convenience and necessity. The plaintiff in the *Ayer* case at p. 443:

> * * * urges the proposition that the denial of his certificate by the Commission was predicated on its conclusion that "the rail carriers appear to be providing the supporting shippers a reasonably adequate service and the matters complained of do not appear to be of sufficient

consequence to warrant a grant of authority herein which would undoubtedly divert considerable tonnage from the railroads"; * * *

The Commission and the United States in the *Ayer* case took the equivalent position as in this case, that there is sufficient evidence to support the Commission's findings and conclusions independent of the adequacy of existing rail service. This view was adopted by the district court even though the Commission found rail service "* * * to be 'reasonably adequate'" (p. 443–444).

A careful reading of the Commission's finding of fact, in addition to an analysis of the evidence as digested above, clearly shows adequate ground for the conclusion that the shippers were motivated in supporting the application solely to gain more advantageous rates. The evidence as shown above discloses that the shippers will continue to use rail service in very large part and that they are satisfied with such service even though to obtain a lower rate they must delay shipments for pool car movements. The record substantially supports the Commission's conclusion (R. 37) that "less-than-carload rail service, while not as expeditious as the proposed service, is fairly good, but because of the higher rate involved this service is seldom used by the supporting witnesses." If the shippers were sincere in their desire for expedited transportation, the evidence should have shown a determined effort to utilize to the fullest extent possible the existing service before seeking to obtain additional competitive transportation. In this respect the record discloses

no utilization of existing interline motor carrier service. The Commission in *Pine Tree Transport, Inc., Ext.—Frozen and Canned Fruits,* 54 M. C. C. 669, 675, has said:

> * * * The shipper is not entitled as a matter of right to direct motor-carrier service to every point to which it ships when reasonably adequate interline service is available. Existing carriers have substantial investments in operating rights, facilities, and equipment necessary to institute and sustain their operations, and they are entitled to all the traffic that they can handle adequately, efficiently, and economically in the territories which they serve without the competition of an additional service. * * *.

The Commission's final conclusion in essence states that applicant failed to bear the burden of proving public convenience and necessity for the proposed service.

Essentially this is what the district court found in the instant case when it pointed out that while it might "* * * have reached a different conclusion if it had been weighing the evidence in this case * * *" (R. 368), nevertheless it held "* * * the Commission acted within the scope of its authority, that the Commission acted without abuse of its discretion, that its action was not arbitrary or capricious, and that there were adequate facts to support its findings and that its conclusions are not contrary to law" (R. 368).

In *Brooks Transp. Co., Inc.* v. *United States,* 108 F. Supp. 244, affirmed per curiam 344 U. S. 804, a

three-judge court, in dismissing a complaint brought to set aside an order of the Commission denying an application for a certificate of public convenience and necessity, posed this question at p. 248:

> Turning to a consideration of the application as one for an extension of service, it is well settled that the question on review is not whether the court would have made the same findings as the Commission on the record before it, but is: Was there a rational basis for the finding made by the Commission?

"* * * The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286, 287; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241. In the absence of any errors of law, and the district court so found, the orders of the Commission should be upheld, "* * * despite the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. * * *." *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547–548; *Scripps-Howard Radio* v. *Commission*, 316 U. S. 4, 10.

We submit that an examination of the report of the Commission based upon the entire record will show that it is a thoroughly considered statement of facts, and that it contains clear conclusions rationally based upon these findings of fact.

II

The Commission's order is consistent with the National Transportation Policy

As noted above, the Commission based its denial of Schaffer's application (apart from the availability of existing motor carrier service for some of the points involved) upon two factors: (1) its finding that the shippers supporting the application are primarily interested in obtaining "lower rates rather than improved service", and (2) the adequacy of the existing rail service for the particular traffic involved (R. 37). The Commission's order clearly was based upon both of these factors, and not solely upon the adequacy of the existing rail service. Accordingly, if this Court should find that the Commission's finding that the shippers were primarily concerned with lower rates is either lacking in evidentiary support or is legally insufficient, we submit that the case should be remanded to the Commission. However, if this Court sustains the Commission's finding and its relevance in determining public convenience and necessity, we contend that the adequacy of the existing railroad service was an additional factor properly to be considered by the Commission.

Initially it should be noted that the appellants, and those associated with them, make varying contentions that the Commission's decision in this case violated the National Transportation Policy. Thus, the appellant motor carrier interests assert that the question involved is whether—

> a motor carrier, in applying for operating authority pursuant to the provisions of Section 207 * * * [is] required to prove that existing rail service is inadequate.

The United States says (U. S. br. 13) that it—

> does not contend that the public convenience and necessity of a proposed motor service is established in and of itself by a showing that rail service is the sole available common carrier service. It does urge that, when railroads have such a monopoly, the Commission misinterprets the "public convenience and necessity" criterion if it bars from the field a motor carrier proposing to furnish significantly superior service. Such action by the Commission, in our view, contravenes the command of the National Transportation Policy: That the Commission shall administer all provisions of the Interstate Commerce Act to the end that the "inherent advantages" of each of the three modes of regulated transportation be recognized and preserved and that "adequate, economical, and efficient" transportation service be promoted.

The National Industrial Traffic League contends—

> that the public is entitled under the law to adequate service by motor vehicle as well as by rail; and the availability of one mode of service has no bearing upon the public need for the other.

The pertinent portions of the National Transportation Policy provide that—

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of

> transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

From the beginning of motor carrier regulation the Commission has in many cases authorized motor carrier service notwithstanding the adequacy of the existing rail service. At the same time, the Commission does not have a rigid policy of granting or denying applications for motor carrier authority in terms of the availability of rail service. Probably the most complete statement of the Commission's views is found in its report on reconsideration in *A. J. Metler Extension—Crude Sulphur,* 62 M. C. C. 143, 147–148 (1953), as follows:

> Under the national transportation policy of "fair and impartial regulation of all modes of transportation" we are required "to recognize and preserve the inherent advantages of each and foster sound economic conditions in transportation and among the several carriers." We do not conceive that every shipper is entitled to have made available to it every mode of trans-

portation or even competing modes of transportation without regard to the volume of the available traffic or the adequacy of whatever transportation may be available. A motor carrier, for example, is not entitled, as a matter of right, to authority to serve a particular point or a particular shipper, merely because there is no other motor service and rail service only is available. Usually it is desirable from the viewpoint of the shipper and in the public interest that competition within reason be encouraged and that there be available to shippers competing modes of transportation, even competing carriers in the same field, but if sound economic conditions in transportation are to be fostered, the advantages of competition must in some instances yield to the needs of the existing carrier or carriers, depending upon the amount of the available traffic and the comparative adequacy of the existing services. Given a limited amount of traffic and an existing carrier of whatever mode which needs it more or less urgently, the question whether a competing service shall be authorized turns upon the question as to the relative or comparative adequacy of the existing service. Conceivably an existing service could be so inadequate to meet a shipper's or community's need as to justify authorization of an additional service of a new type regardless of the need of the existing carrier. The overall public need is the ultimate consideration behind the need of the carrier and if it cannot be met consistently with the carrier's need then the latter must yield.

By a letter dated January 6, 1956, to the Chairman of the Senate Select Committee on Small Business,

the Commission referred to the above-quoted portion of its report in the *Metler* case as a correct statement of its views. See Appendix B, *infra*, pp. 44–48.

Nothing in the Commission's report in the instant case indicates a departure from its policy as stated in the *Metler* case. Its decision here (as to the points not already served by motor carrier) is not based solely upon the adequacy of the existing rail service, but upon that factor plus its finding that the shippers who supported Schaffer's application did so primarily "to obtain lower rates rather than improved service."

Nothing in the National Transportation Policy or its history or in the decisions of this Court even suggests that in determining whether public convenience and necessity requires additional motor carrier service the Commission must ignore completely the impact of its action upon existing transportation facilities of whatever mode. On its face, that Policy commands that the Act be administered "to foster sound economic conditions in transportation * * * all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail * * *." The quoted portions of the National Transportation Policy can only mean that the Commission is not to ignore the effect of additional transportation facilities upon existing facilities of all kinds. This is made even clearer in the discussion of the Policy in the report of the Senate Committee on Interstate Commerce as follows:

> * * * As has been so often said, in 1887, when the original act to regulate commerce was passed, directed to correct abuses by railroads,

the railroads had a monopoly on transportation. In later years competing forms of transportation have developed with such rapidity that no one now urges that there is any such monopoly. The railroads at first refused to treat these competing forms of transportation, particularly by motor, seriously, and it was not until after much of their traffic and many of their passengers had been lured away that the railroads took drastic steps to recover the lost business. The sum and substance of the matter is that at the present time there is a plethora of transportation facilities, and under these circumstances it becomes apparent that some tribunal must be empowered with the authority to determine into what particular niche each form of transportation is best fitted, and to discourage other forms of transportation from entering therein. S. 2009 seeks to do this. * * * *Sen. Rep. No. 433, 76th Cong., 1st Sess.*, 2–3 (1939).]

Similarly Professor Oppenheim in his treatise on the National Transportation Policy states that:

> * * * Senator Wheeler, in particular, was emphatic in his view that the declaration of policy could be relied upon as assurance that the Commission would be on notice that Congress had conferred upon it the authority and the plain duty of adjusting and coordinating inter-carrier competitive relationships with a view to the national transportation system as a whole. [*Oppenheim, The National Transportation Policy and Inter-Carrier Competitive Rates* (1945), pp. 9–10.]

The appellants' contention that the Commission was precluded by the National Transportation Policy from even considering the adequacy of existing railroad service, appears to be based largely upon the view that the only pertinent command of the Policy is to "preserve the inherent advantages of each" mode of transportation. This Court, however, has already held that the Commission must take into account all of the objectives of the Policy. Thus, as it was stated in *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 66,

> * * * That declaration requires administration so as to preserve the inherent advantages of each method of transportation and to promote "safe, adequate, economical, and efficient service." Such broad generalizations, while well expressing the Congressional purpose, must frequently produce overlapping aims. In such situations, the solution lies in the balancing by the Commission of the public interests in the different types of carriers with due regard to the declared purposes of Congress. [Citing cases.]

Finally, in *Alton Railroad Co.* v. *United States*, 315 U. S. 15, this Court held that railroads were parties in interest and had standing to sue to set aside an order of the Commission granting a certificate of public convenience and necessity to a motor carrier. In so holding, the Court stated (315 U. S., at 19–20) that:

> * * * We do not stop to inquire what effect, if any, the status of appellant railroad companies as intervenors before the Commission

had on their right to bring and maintain this suit. Cf. *Chicago Junction Case*, 264 U. S. 258, with *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479. They clearly have a stake as carriers in the transportation situation which the order of the Commission affected. They are competitors of Fleming for automobile traffic in territory served by him. *They are transportation agencies directly affected by competition with the motor transport industry—competition which prior to the Motor Carrier Act of 1935 had proved destructive. S. Doc. No. 152, 73d Cong., 2d Sess., pp. 13–27.*

They are members of the national transportation system which that Act was designed to coordinate. S. Rep. No. 482, 74th Cong., 1st Sess.; H. Rep. No. 1645, 74th Cong., 1st Sess. Hence they are parties in interest within the meaning of § 205 (h) under the tests announced in *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266; *Western Pacific California R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47; and *Claiborne-Annapolis Ferry Co.* v. *United States, supra.* [Emphasis supplied.]

We submit that the rationale of this decision, without more, demonstrates that it was proper for the Commission to take into account, with other factors, the adequacy of the existing railroad service.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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SEPTEMBER 1957

APPENDIX A

Statutes Involved

National Transportation Policy, 49 U. S. C., preceding §§ 1, 301, 901, and 1001:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 207, 49 U. S. C., § 307.

> (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able prop-

erly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

APPENDIX B

Pertinent part of letter from the Chairman of the Interstate Commerce Commission dated January 6, 1956, to Senator John Sparkman, Chairman, Senate Select Committee on Small Business. *Hearings before the Select Committee on Small Business on the Administration of the Motor Carrier Act by the Interstate Commerce Commission as it Affects Small Truckers and Shippers*, 84th Cong., 1st Sess., pp. 502–503, App. 27 (1955):

> 4. Mr. Barnes stated that the Department of Justice has "refused to support the Commission's new doctrine that rail service to a given area is sufficient ground for denial of truck service." His statement continued that "for the first 15 years of its administration, the Commission repeatedly held that the existence of adequate rail service was insufficient ground for denial of motor carrier service to serve the same area," but that recently "the Commission has shown signs of departing from this policy." In support of his statement, Mr. Barnes cites several cases in which the Commission denied motor carrier authority where it was shown, among other factors, that adequate rail service existed. Mr. Barnes further stated that "In at least two instances recently the Department of Justice, after consultation with Commission counsel, has succeeded in prevailing upon the Commission to retract its orders denying a motor carrier authority on the grounds of existing adequate rail service."
>
> To the contrary, the Commission has never had a rigid policy with respect to granting or denying applications for motor carrier au-

thority where rail service is available. Indeed, during the same period referred to by Mr. Barnes, the Commission granted many applications for motor carrier service in situations where rail service was available.[3] More important, the Interstate Commerce Act contains no inflexible requirements that a motor carrier application shall be granted regardless of the adequacy of existing rail service, or that shippers are entitled in all circumstances to a choice between rail and motor service. The nearest approach to such a legislative policy is the statement in the national transportation policy that there shall be fair and impartial regulation of all modes of transportation, "so administered as to recognize and preserve the inherent advantages of each." Another purpose of the national transportation policy is to "foster sound economic conditions in transportation and among the several carriers." In the light of these congressional objectives, the Commission is required to determine upon the record in each case whether a proposed motor carrier service is required by the present or future public convenience and necessity. In determining the need for new or additional motor carrier service, the Commission must consider not only the available transportation service but also the nature and volume of commodities to be moved, the peculiar needs of shippers, the quality of the existing service, and similar factors.

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[3] *Erskine and Sons, Inc., Extension—Bulk Commodities*, 64 M. C. C. 87; *Dracup Extension—East Walpole, Mass.*, 64 M. C. C. 147; *Maughan Transport, Inc., Extension—Three States*, 63 M. C. C. 611; *Contract Freighters, Inc., Extension—Glass Products*, Docket No. MC–16007 (Sub-No. 12); *Thomas B. Puryear Extension—Delaware*, Docket No. MC–60041.

In contrast, Mr. Barnes' statement embodies the view that in all cases and regardless of the consequences there should be competition between motor carriers and railroad. This is clearly shown by the following statement from his presentation to the committee:

> In sum, then, this Department's unswerving position is that shippers are entitled to a choice between rail and motor carrier service. This free choice may be the essence of competition in the distribution process.

The Commission rejects such a concept of public convenience and necessity. It believes that to adopt and follow the rigid rule urged by the Department of Justice would often preclude the application of the statutory standards to the facts of particular cases. The Commission's rejection of Mr. Barnes' view, coupled with a full statement of the Commission's position, is found in the Commission's report on reconsideration in *A. J. Metler Extension—Crude Sulphur*, 62 M. C. C. 143 (1953), which is one of the cases in which, according to Mr. Barnes, "the Department of Justice * * * has succeeded in prevailing upon the Commission to retract its orders * * *." The pertinent portion of the Commission's report is as follows:

> Under the National Transportation Policy of "fair and impartial regulation of all modes of transportation" we are required "to recognize and preserve the inherent advantages of each and foster sound economic conditions in transportation and among the several carriers." We do not conceive that every shipper is entitled to have made available to it every mode of transportation or even competing modes of transportation without regard to the volume of the available traffic or the adequacy of whatever transportation may be available. A motor carrier,

for example, is not entitled, as a matter of right, to authority to serve a particular point or a particular shipper, merely because there is no other motor service and rail service only is available. Usually, it is desirable from the viewpoint of the shipper and in the public interest that competition within reason be encouraged and that there be available to shippers competing modes of transportation, even competing carriers in the same field but if sound economic conditions in transportation are to be fostered, the advantages of competition must in some instances yield to the needs of the existing carrier or carriers, depending upon the amount of the available traffic and the comparative adequacy of the existing services. Given a limited amount of traffic and an existing carrier of whatever mode which needs it more or less urgently, the question whether a competing service shall be authorized turns upon the question as to the relative or comparative adequacy of the existing service. Conceivably, an existing service could be so inadequate to meet a shipper's or community's need as to justify authorization of an additional service of a new type regardless of the need of the existing carrier. The overall public need is the ultimate consideration behind the need of the carrier and if it cannot be met consistently with the carrier's need then the latter must yield.

Denial of the instant application in the prior reports in this proceeding was predicated on the adaptability of bulk sulphur to movement by rail and grew out of an appreciation of the railroad's need for all available traffic and a lack of appreciation of the impracticality and difficulties involved in this instance in using rail service. Reexamination of the evidence now convinces us that

> it is, in fact, impracticable for the shipper to use rail service, that in the circumstances here present the rail service is insufficient and inadequate reasonably to meet the shipper's need, and that the railroad's need for revenue must yield to the shipper's (the public) need for motor service. * * *.

In brief, the Commission recognizes the desirability of competition between rail and motor carriers except where other factors indicate that competition will not serve the ultimate public convenience and necessity.